No. 91-594

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

AMERICAN NATIONAL RED CROSS,

Petitioner,

v.

S.G. and A.E.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF AMICUS CURIAE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Association of Trial Lawyers of America ["ATLA"] is a national voluntary bar association whose approximately 65,000 members primarily represent those who have suffered personal injury, deprivation of civil rights, or economic harm as a result of tortious misconduct. Tort law has traditionally been state law, primarily administered by state courts. For this reason, ATLA views the position urged

upon this Court by the American National Red Cross ["Red Cross"] as an unwarranted usurpation of state court power and a serious erosion of the role of state courts in presiding over causes of action principally involving questions of state law.

The parties' letters of consent to the filing of this brief have been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

The corporate charter of the Red Cross, 36 U.S.C. §2, permits the Red Cross "to sue and be sued in courts of law and equity, State or Federal . . . " The court below determined that this language does "not create original federal jurisdiction over all suits involving the Red Cross." *S.G. v. American National Red Cross*, 918 F.2d 1494, 1495 (1st Cir. 1991). The court correctly concluded that there is no "talismanic significance" to the mere inclusion of the word "federal" in the charter and instead properly focused on the meaning of the charter as a whole. *Id.* at 1497.

The First Circuit held that the charter language represents a simple grant of capacity to sue in the state or federal courts -- not a grant of federal jurisdiction. This conclusion is amply supported by this Court's precedents and the intent of Congress in enacting 36 U.S.C. §2.

The position advanced by the Red Cross is that there are "good reasons to afford the Red Cross a federal forum in all cases." Pet. Br. at 32. Whether Congress *should* have granted federal jurisdiction is not relevant. The issue before this Court is simply to determine what the legislature has in fact done. In the absence of any evidence that Congress intended

to create jurisdiction, the First Circuit properly refused to legislate in Congress' place.

ARGUMENT

I. THE RED CROSS CHARTER DOES NOT CONFER ORIGINAL FEDERAL QUESTION JURISDICTION OVER ALL CASES INVOLVING THE RED CROSS.

The Red Cross corporate charter at issue in this case states in relevant part:

> [section] 2 *Name of Corporation; powers*
>
> The name of the corporation shall be "the American National Red Cross" and by that name it shall have perpetual succession, *with the power to sue and be sued in courts of law and equity, state or federal, within the jurisdiction of the United States*; . . .

36 U.S.C. §2 (1988)(emphasis added). The Red Cross asserts that the mere inclusion of the word "federal" in its (or any other) congressional corporate charter confers exceptional or privileged jurisdiction in the federal courts. Pet. Br. at 14, 23. The Red Cross relies primarily on *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824).

After an exhaustive review of this Court's precedents, including *Osborn*, and following an thorough analysis of congressional intent behind such charters, the First Circuit rejected the Red Cross' expansive view of *Osborn*. The court stated that neither *Osborn* nor its progeny "confer talismanic significance on a simple reference to federal courts in a

congressional charter." 938 F.2d at 1497. Instead, the First Circuit recognized that when Congress endows a corporation with the right to invoke federal jurisdiction, it commonly uses "clear and specific language." *Id.* at 1500. Amicus submits that the court below properly rejected the Red Cross' "expansive view of federal jurisdiction," and correctly held that the Red Cross charter failed to meet the minimal requirements set forth in *Osborn* for establishing federal question jurisdiction. *Id.* at 1499.

A. Congressional Grants of Jurisdiction May Not Be Implied From General Sue-And-Be-Sued Clauses.

Generally a corporate charter which confers the right to sue and be sued creates only the capacity to litigate. Fed. R. Civ. P. 17(b). This rule also applies to corporations chartered by Congress. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809); *Bankers Trust v. Texas and Pacific Ry. Co.*, 241 U.S. 295, 305 (1916). Congressional charters, however, may also confer original jurisdiction over all cases involving the corporation. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 817 (1824); *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447, 454 (1942).

This Court has made it clear that jurisdictional grants must be specific, since general language results only in a "general capacity to sue and be sued in courts of law and equity whose jurisdiction as otherwise defined was appropriate to the occasion, . . ." *Bankers Trust*, 241 U.S. at 305. The Red Cross position, which would find a broad jurisdictional grant in the ambiguous language of the charter, is contrary to this Court's clearly enunciated standards.

This Court first addressed the jurisdictional aspect of sue-and-be-sued clauses in federal charters in *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809). There the Court interpreted the charter of the first Bank of the United States. The charter gave the bank the power "to sue and be sued . . . in courts of record, *or any other place whatsoever*." *Id.* at 85 (emphasis added). The Court held that the plain meaning of this language "is not understood to enlarge the jurisdiction of any particular court, but to give a capacity to the corporation to appear, . . ." *Id.* Chief Justice Marshall declared that "the right to sue does not imply a right to sue in the courts of the Union, *unless it be expressed*." *Id.* (emphasis added).

Fifteen years later, in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), the Court construed a similar sue-and-be-sued clause in the charter of the second bank of the United States. Unlike the provision found wanting in *Deveaux*, which did not refer to the jurisdiction of a particular court, the second bank charter expressly provided that the bank shall have the power "to sue and be sued . . . in all courts having competent jurisdiction, *and in any circuit court in the United States*." 22 U.S. at 816 (emphasis added). Significantly, the circuit courts of the United States were at that time specific courts of original jurisdiction. *See* Act of September 24, 1789, 1 Stat. 73. This reference to a particular court provided the basis for the Court's finding of a grant of jurisdiction:

> [The words of the charter] seem to the Court to admit but one interpretation; they cannot be made plainer by explanation. They give, expressly, the right to "sue and be sued," "*in every circuit court of the United States*," and it would be difficult to

> substitute other terms which would be more direct and appropriate for the purpose.

Id. (emphasis added). This phrase is the minimum language that this Court has ever found to confer jurisdiction.[1]

This Court directly addressed this issue on one other occasion. In *Bankers Trust v. Texas and Pacific Ry. Co.*, 241 U.S. 295 (1916), the language at issue was contained in the charter of the Texas and Pacific Railway. The charter provided that the railway could "sue and be sued, . . . in all courts of law and equity within the United States." 241 U.S. at 302, *citing* Act of March 3, 1871, ch. 122, §1, 16 Stat. 573.

This Court held that the words were not intended in themselves to confer jurisdiction upon any court. 241 U.S. at 303. Significantly, the Court's interpretation of the railroad charter is virtually identical to the text of the Red Cross charter:

> [E]vidently all that was intended was to render this corporation capable of suing and being sued by its corporate name *in any court of law or equity -- Federal, state, or territorial* -- whose jurisdiction as otherwise competently defined was adequate to the occasion.

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[1] In subsequent cases, this Court has noted that broad jurisdictional principles articulated in *Osborn* might be questionable *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 492-93 (1983). This Court has never suggested that *Osborn* be read *more* expansively, as suggested by the Red Cross.

Id. (emphasis added). *Compare* 36 U.S.C. §2 (Red Cross may sue and be sued "in courts of law and equity, state or federal . . .") Construing the railroad charter in this manner, this Court nevertheless found it to "have been the same generality and natural import" as the insufficient language in *Deveaux*. Id. at 304. Accordingly, the railroad charter did not "establish an exceptional or privileged jurisdiction." *Id.* at 305.

The First Circuit correctly noted that the *Bankers Trust* result was influenced in part by the congressional intent behind §5 of the Judiciary Act of January 28, 1915. That Act prohibited the finding of federal jurisdiction solely on the ground that a railroad was incorporated under an Act of Congress. Act of January 28, 1915, ch 22, §15, 38 Stat. 803. In 1925, Congress enacted a similar amendment which applied to all federally chartered corporations. 28 U.S.C. §1349.[2] The First Circuit read *Bankers Trust* and these general congressional limits on federal question jurisdiction to require that "a congressional grant of [original] jurisdiction should not be implied from ambiguous language." 938 F.2d at 1498.

In addition, the court below found the Red Cross charter ambiguous in ways that the second bank charter in *Osborn* was not. Specifically, the Red Cross charter refers to both state and federal courts through the use of the parallel phrase "to sue and be sued in courts of law and equity, State or

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[2] These jurisdiction-limiting statutes were enacted to counter the flood of federal incorporation cases which followed the establishment of general federal question jurisdiction in the Judiciary Act of 1875. Act of March 3, 1875, 18 Stat. 470. *See* Mishkin, *The Federal "Question" In the District Courts*, 53 Colum. L. Rev. 157, 160 n.24 (1953).

Federal, . . ." *Id.* By contrast, the charter in *Osborn* avoided that vagueness by giving the bank the power to sue and be sued "in all *state courts having competent jurisdiction*" and second, to sue and be sued "in any *circuit court* in the United States" (emphasis added). The first phrase plainly assumes that state courts possess competent jurisdiction over the bank so that Congress needed only to grant the capacity to sue. The second phrase, referring to federal courts, does not make that assumption. Accordingly, Congress named a specific federal court of original jurisdiction -- the circuit court -- and did not require an independent basis for appearing in that court, *i.e.* that the court be otherwise "competent." The absence of that "jurisdictional caveat" and the specific reference to the circuit court "simultaneously confer[red] the power to sue *and* expand[ed] federal jurisdiction to include such suits." *Id.* (emphasis added). *See also Anonymous Blood Recipient v. William Beaumont Hosp.*, 721 F. Supp. 139, 144 (E.D. Mich. 1989)(The *Osborn* charter "allowed the bank to litigate in state court *with* jurisdiction, but allowed the bank to sue *in all* federal courts, regardless of jurisdiction")(emphasis in original).

The Red Cross criticizes the First Circuit's refusal to adopt a formalistic approach. The Red Cross contends that Congress need only recite the magic word "federal" in a congressional charter to confer jurisdiction. Pet. Br. at 23 (". . . a sue-and-be-sued clause that refers generally to the federal courts confers federal jurisdiction.") This is simply not the teaching of *Osborn*. Indeed, as one court accurately observed:

> The Red Cross' interpretation of its charter would also allow it to sue or be sued in a Circuit Court of

> Appeals or the Supreme Court, which are also federal courts of law and equity.
>
> . . . *Osborn* is controlling precedent, but it does not support the Red Cross' argument.

Boutar v. American National Red Cross, Civ. No. 90-3155 (HHG), slip op. at 3-4 (D.D.C. April 9, 1991); *See also Walker v. American National Red Cross*, No. 91-0749 (GHR), slip. op. at 5 (D.D.C. May 10, 1991). The language in the *Osborn* charter has been considered the "minimum language required" to confer jurisdiction. *Anonymous Blood Recipient v. Sinai Hosp.*, 692 F. Supp. 730, 733 (E.D. Mich. 1988). The language in the Red Cross Charter does not reach that minimum, and this Court should refuse to lower the threshold.

B. This Court's *D'Oench* Opinion Reinforces the Rule That Original Jurisdiction Should Not Be Inferred From Ambiguous Language.

The Red Cross asserts that *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp.*, 315 U.S. 447 (1942) "proves conclusively that the First Circuit erred." Pet. Br. at 21. This assertion fails for at least two reasons. First, the Red Cross distorts *D'Oench* by claiming that it "represents the only occasion when this Court *has* confronted a sue-and-be-sued clause that referred specifically to the federal courts but not to any particular federal court." Pet. Br. at 21 (emphasis in original). Second, the Red Cross erroneously suggests that *D'Oench* "held" that the congressional grant to sue and be sued in "any court of law and equity, State or Federal" contained in the FDIC Charter was the sole basis for the federal jurisdiction in all cases involving the FDIC.

As a preliminary matter, *D'Oench* did not purport to analyze the FDIC sue-and-be-sued clause in light of *Deveaux*, *Osborn*, and *Bankers Trust*. The Court did not even cite those cases. Accordingly, this Court never considered whether this language standing alone was sufficient to confer original jurisdiction. The Red Cross concedes as much. *See* Pet. Br. at 23 ("The basis of jurisdiction . . . [was] . . . not the ultimate issue in *D'Oench*.") Instead, the issue before the Court was whether a federal court in a non-diversity case should apply state law or federal common law. *D'Oench* at 455. In holding that federal common law applies, this Court simply observed that federal question jurisdiction, not diversity jurisdiction, was involved. *Id.*[3]

More importantly, the *D'Oench* Court recognized the sue-and-be-sued-clause was not the sole source of jurisdiction. The Court noted that Congress, in another section of the statute, had explicitly provided that suits involving the FDIC raise federal questions. *Id.* at 455 n.2 (citing 17 U.S.C. §264(j)(1940)). Section 264(j) unambiguously states "All suits of a civil nature at common law or in equity to which the Corporation shall be a party *shall be deemed to arise under the laws of the United States* . . ." (emphasis added). The Red Cross dismisses this clarifying language, indicating that its location in a footnote

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[3] While the Court could have questioned jurisdiction on its own, it did not, and the parties never raised the issue. *See D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 117 F.2d 491 (8th Cir. 1941). Most likely, 17 U.S.C. §264(j)(1940), discussed below, removed any ambiguity from the sue-and-be-sue clause.

somehow diminishes its import. Pet. Br. at 21.[4] This disregard for §264(j) as the basis for jurisdiction ignores the relevant history of the FDIC.

The First Circuit accurately noted that the Banking Act of 1933 originally provided that the FDIC could sue or be sued "in any court of law or equity, State or Federal." 938 F.2d at 1499 n.5. Significantly, Congress amended the Act in 1935 to add the express and unambiguous language of §264(j) which was quoted by the *D'Oench* Court in footnote 2. The Senate Report further expressed that the purpose of this amendment was to "*give jurisdiction*, in the case of suits of a civil nature to which the corporation is a party, *to courts having jurisdiction of suits arising under the laws of the United States*." S. Rep. No. 1007, 74th Cong., 1st Sess. 5 (1935)(emphasis added). "Clearly, if Congress believed that the express power to litigate in federal courts was sufficient to create original jurisdiction in those courts, this amendment would not have been necessary." *Walton v. Howard Univ. Hosp.*, 683 F. Supp. 826, 828 (D.D.C. 1987). *See also Federal Deposit Ins. Corp. v. George-Howard*, 153 F.2d 591, 593 (8th Cir.), *cert. den.* 329 U.S. 719 (1946)(relying upon the 1935 amendment to confer original jurisdiction in the federal courts).

Amicus suggests that the Red Cross' assertion of a "universally shared assumption in the 1940s (when the Red Cross Charter was amended) that a sue-and-be-sued clause referring to the federal courts confers jurisdiction," Pet. Br.

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[4] *But cf. Collins v. American Red Cross*, 724 F. Supp. 353, 356 (E.D. Pa. 1989)("[A]nything the Supreme Court finds it worthwhile to say should be regarded as meaningful."); *see also Luckett v. Harris Hospital-Fort Worth*, 764 F. Supp. 436, 440 (N.D. Tex. 1991).

at 22, is insupportable and wrong in light of *D'Oench* and the legislative history of the FDIC.

The First Circuit correctly recognized that other enactments amply demonstrate Congress' belief that sue-and-be-sued clauses which merely refer to the federal courts do not confer jurisdiction. 938 F.2d at 1500. *See, e.g.*, Act of Aug. 1, 1947, ch. 440, §7, 61 Stat. 719 (amending the Federal Crop Insurance Corporation Charter to confer jurisdiction in the district courts "without regard to the amount in controversy"); Act of June 29, 1948, ch. 704, §4, 62 Stat. 1070 (in creating the Commodity Credit Corp., Congress provided that district courts "shall have exclusive original jurisdiction, without regard to the amount in controversy, of all suits brought by or against the Corporation.") The court below logically observed:

> Had Congress intended to expand jurisdiction [in the Red Cross Charter], it could easily have adopted the clear and specific language used to create federal jurisdiction common in other charters amended at approximately the same time.

Id.

The First Circuit correctly found nothing in *D'Oench* that altered the minimum language described by *Osborn* as necessary to create federal jurisdiction. Accordingly, amicus suggests, it was clear in the 1940s that Congress was required to do more than refer generally to federal courts to confer federal jurisdiction. Nevertheless, Congress did not amend the Red Cross Charter to include an express grant of federal jurisdiction, as it had for the FDIC and other congressionally chartered corporations. The court below properly refused to legislate in Congress' place.

II. THE LEGISLATIVE HISTORY OF THE 1947 AMENDMENT TO THE RED CROSS CHARTER EVINCES NO CONGRESSIONAL INTENT TO CONFER FEDERAL JURISDICTION.

The Red Cross acknowledges that "the best indication of Congress' intent in amending the Red Cross Charter in 1947 is the words Congress chose and their established meaning at the time." Pet. Br. at 37. As the court below found and as amicus has demonstrated, the words Congress chose in the Red Cross Charter did not meet even the minimum requirements of *Osborn*. By 1947, when the relevant language was added to the Red Cross Charter, Congress clearly knew how to establish federal jurisdiction when it so intended. *See D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447 (1942). Congress did not do so, and that should end the inquiry.

The Red Cross nevertheless argues that the legislative history behind the 1947 amendment provides a clue to congressional intent which cannot be found in the express language of the charter. The First Circuit properly rejected this contention, finding that the legislative history is "sparce and evinces no clear intent on the part of Congress . . ." 938 F.2d at 1499.

Prior to 1947, the Red Cross had the power to "sue and be sued in courts of law and equity within the jurisdiction of the United States." Act of January 5, 1915, ch. 23, §2, Stat. 600. The 1947 amendment simply added the parallel phrase "state or federal." 36 U.S.C. §2. The Red Cross complains that the First Circuit's interpretation renders the amendment "a nullity." Pet. Br. at 41. Amicus suggests, however, that the more natural reading of the legislative history leads to the

conclusion that Congress was merely reconfirming the Red Cross' capacity to sue in state and federal courts. As this Court has recognized:

> Mere change of language does not necessarily indicate intention to change the law. The purpose of the variation may be to clarify what was doubtful and to safeguard against misapprehension as to existing law.

Helvering v. New York Trust Co., 292 U.S. 455, 468-69 (1934).[5]

In support of its claim that the 1947 amendment transformed the charter from a mere capacity to sue to an express jurisdictional grant, the Red Cross relies heavily on the Harriman Committee Report. This committee was formed by the Red Cross to advise Congress on procedural changes in the Red Cross Charter. Whatever the intentions of the committee, it is "doubtful that Congress adopted those intentions," since the Senate Report "makes no mention of the jurisdictional point whatsoever." *Roche v. American Red Cross*, 680 F. Supp. 449, 453 (D. Mass. 1988)(*citing* S. Rep. No. 38, 80th Cong., 1st Sess., *reprinted in* 1947 *U.S. Code Cong. Serv.* 1028).

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[5] It is clear that after the *Bankers Trust* case and the enactment of 28 U.S.C. §1349, the Red Cross could only appear in federal court on the basis of diversity or another source of federal question jurisdiction. The corporate charter was not a source of federal question jurisdiction. It was under these circumstances that the clarification was sought.

Even assuming that Congress adopted the Harriman Committee recommendations, the specific recommendation relied upon, No. 22, does not support its cause. The committee requested only that the charter "make it clear" that the Red Cross has the power (i.e., capacity) to sue and be sued in federal courts. Report of the Advisory Committee on Organization (June 11, 1946). Pet. Br. at App. 3a. Indeed, the committee's stated purpose was to *reaffirm* the corporate powers granted by the original 1905 *Deveaux*-like charter:

> The Red Cross has in several instances sued in the federal courts, and its power in this respect has not been questioned. However, in view of the limited nature of the federal courts it seems desirable that this right be clearly stated in the charter.

Id. at 4a. It is obvious that the committee was not concerned with converting the charter from one which simply grants corporate power (as did the clause in *Bankers Trust*) to one which confers federal jurisdiction (as did the clause in *Osborn*).[6] Rather, it merely sought to "clarify" that which it implicitly had -- the capacity to sue in the federal courts -- if jurisdiction was otherwise adequate.

Nor is there any indication in the Senate hearings on the amendment that Congress intended to confer federal jurisdiction. *See American National Red Cross: Hearing on S. 591 Before Senate Comm. on Foreign Relations*, 80th Cong., 1st Sess. 7-11 (1947)[hereinafter "*Hearing*"]. To the

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[6] The pre-1947 Red Cross Charter was virtually identical to the charter found not to confer jurisdiction in *Bankers Trust*, 241 U.S. at 302 (the railroad could "sue and be sued . . . in all courts of law and equity within the United States").

contrary, the discussion by Senators White, Connally, and Thompson clearly reflects their interpretation of the provision as a simple grant of corporate power. *Id.* Even Mr. Harriman assured the committee that the amendments affected only "corporate structure," a characterization that was reiterated by committee chairman Senator Vandenberg. *Id.* at 6-7. In spite of the many references to the "power" of the Red Cross to litigate contained in the report, the Red Cross seizes upon a single isolated comment by Senator George that the purpose of the amendment was "to give the jurisdiction in State courts and Federal courts . . ." Pet. Br. at 6, quoting *Hearing* at 10. The Red Cross omits reference to Senator George's explanation of his remark:

> . . . there might be some question about the right of a Federal corporation to be sued in a State court. *I thought that was, and I still think it is, the purpose of this provision.*

Id. at 11 (emphasis added). Moreover, Sen. George characterized the amendment as "creating a corporation" and granting "the power to sue and be sued here in our courts." *Id.* at 9. One district court has found it "difficult to conclude from the remarks made during the hearing that the Committee intended to cause litigation involving the Red Cross to arise under the laws of the United States, and thereby to expand the original jurisdiction of the federal courts." *Walton v. Howard Univ. Hosp.*, 683 F. Supp. 826, 829 (D.D.C. 1987).

In the First Circuit's view, this legislative history "evinces no clear intent on the part of Congress to confer original jurisdiction." 938 F.2d at 1499. The court found additional support for this conclusion from the sole case

discussing federal jurisdiction and the Red Cross close in time to the amendment. *Patterson v. American National Red Cross*, 101 F. Supp. 655 (M.D. Fla. 1951) held that the charter insured only that the Red Cross could be brought into court under diversity jurisdiction. The First Circuit attached some significance to the fact that the Red Cross in *Patterson* "did not even suggest that the amendment conferred federal jurisdiction." 938 F.2d at 1500.[7] It seems apparent that the argument so strenuously urged by the Red Cross is of recent invention, raised only after persons infected with HIV from blood transfusions began to file claims in the mid-1980's. Amicus suggests that the argument is precisely the type of "lawyerly invention" which the Red Cross -- and this Court -- have justly criticized. See Pet. Br. at 29, *citing K mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 187 (1988).

III. PUBLIC POLICY DOES NOT SUPPORT FEDERALIZING ALL CASES INVOLVING THE RED CROSS.

Ultimately, the Red Cross relies upon "good reasons to afford the Red Cross a federal forum in all cases." Pet. Br. at 32. Amicus respectfully suggests that these arguments are properly directed to Congress, which alone possesses the plenary power to confer jurisdiction. This Court has long cautioned judges against enacting legislation under the guise

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[7] The Red Cross seeks to discredit *Patterson*, by criticizing the trial judge (who may have "misunderstood the argument") and counsel (who were likely "unpaid volunteers" who neglected to raise the issue out of tactical considerations or "simple ignorance"). Pet. Br. at 40. The fact remains, however, that for nearly four decades neither Congress, nor the courts, nor the Red Cross itself suggested that the charter created federal jurisdiction.

of statutory construction. *See Heiner v. Donnan*, 285 U.S. 312, 331 (1932); *Washington Metropolitan Area Transit Auth. v. Johnson*, 467 U.S. 925 (1984)(Rehnquist, J., dissenting).

Nevertheless, the Red Cross suggests that its important national function entitles it to a presumption of jurisdiction Pet. Br. at 32-33. It alleges, for example, that the First Circuit's decision will "impede uniformity in resolving the federal questions that will arise repeatedly" in litigation involving the Red Cross. *Id.* at 34. The Red Cross offers no support for its premise that state courts are incapable of handling such questions. Moreover, even the Red Cross concedes that, as a practical matter, at least some of its litigation will "principally involve questions of state law, and it could be argued that those questions should be entrusted to state courts." *Id.* at 35. An instructive case is *Kaiser v. Memorial Blood Center*, 938 F.2d 90 (8th Cir. 1991). There the Eighth Circuit retained jurisdiction under §2 of the Red Cross Charter only to certify a state law question to the Supreme Court of Minnesota.

There are, moreover, countervailing policy considerations associated with conferring original federal jurisdiction. One district court warns:

> It could well federalize all Red Cross cases. Not only would the emerging wave of contaminated blood cases be added to the federal dockets but so could every contract dispute between a supplier and Red Cross chapter, as well as personal injury cases involving allegedly defective conditions on Red Cross premises or negligent acts by Red Cross agents and employees, to cite but a few examples.

Collins v. American Red Cross, 724 F. Supp. 353, 358 (E.D. Pa. 1989).

Tort law is, essentially, state law, primarily administered and developed by state courts. The Red Cross' contention that "Congress would not have wanted to subject the Red Cross to state-court litigation without its consent" flies in the face of this Court's clearly enunciated respect for state-federal relations. Where federal preemption is asserted, for example, this Court begins with the "basic assumption that Congress did not intend to displace state tort law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Even in a field as heavily regulated by the federal government as nuclear safety, this Court has found that "Congress assumed that traditional principles of state tort law would apply with full force unless they were expressly supplanted." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984).

Amicus suggests, however, that questions concerning the scope of the jurisdiction of the federal courts cannot and may not be decided on the basis of public policy or interest balancing. The First Circuit properly resisted the invitation to do so. Noting that its "responsibility as a court is to interpret the law as written," the court held that

> [N]either the express language nor the legislative history of the 1947 amendment of §2 establishes that Congress intended to grant the Red Cross access to federal courts for the disposition of cases governed by state law absent some independent basis for federal jurisdiction.

938 F.2d at 1501. This conclusion is amply supported by reason and precedent.

CONCLUSION

For these reasons, Amicus respectfully urges this Court to affirm the order of the court of appeals.

Respectfully submitted,

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